91-454

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THOMAS W. DEVANEY,
Petitioner,
v.
XEROX CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES T. ROSE
Counsel of Record for
Petitioner THOMAS W. DEVANEY

LEEDS & ROSE
Suite 1200
2049 Century Park East
Los Angeles, California 90067
213/788-0535

Bowne of Los Angeles, Inc., Law Printers. (213) 627-2200

QUESTION PRESENTED FOR REVIEW

Whether, after a timely demand for a jury, Petitioner may be denied a jury trial where Respondent joined its equitable claim for specific performance of an alleged oral contract with its legal claim for damages and Petitioner denied the existence of the alleged oral contract?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	2
Jurisdiction of the United States Supreme Court	2
Constitutional and Statutory Provisions	2
Statement of the Case	4
Jurisdiction of the US District Court	6
Argument	6
Conclusion	8
Appendix	1a
US Court of Appeals for the Ninth Circuit	
— Order Dated June 25, 1991 Denying Petition for Rehearing	1a
— Memorandum Decision Dated April 12, 1991	2a
US District Court	
— Partial Reporter's Transcript for March 21, 1989	5a
— Cross-Claim Dated March 22, 1989	6a
— Demand for Jury Trial Dated March 28, 1989	11a
— Order Dated April 28, 1989 Denying Jury Trial	12a
— Findings of Fact and Conclusions of Law Dated July 31, 1989	14a
— Judgment Dated July 31, 1989	20a

TABLE OF AUTHORITIES

Cases

Page

Baltimore & Carolina Line, Inc. v. Redman 295 U.S. 654, 657-58, 55 S.Ct. 890, 891-92 79 L.Ed.1636 (1935) 7, 8

Beacon Theatres, Inc. v. Westover 359 U.S. 500, 3 L.Ed.2d 988, 79 S.Ct. 948 (1959) 6

Dairy Queen, Inc. v. Wood 369 U.S. 469, 8 L.Ed.2d 44, 82 S.Ct 984 (1962) 6

Meeker v. Ambassador Oil Corp. 308 F.2d 875 (10th Cir. 1962) 6

Ross v. Bernard 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970) 6, 7, 8

Simler v. Conner 372 U.S. 221, 9 L.Ed.2d 691, 83 S.Ct. 609 (1963) 6

United States Constitution

Seventh Amendment 2

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 6

Court Rules

Federal Rules of Civil Procedure

Rule 38 (a) to (c) 2

Rule 39 (a) 2

No.

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*Respondent.**

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---

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Thomas W. Devaney, the Petitioner herein, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case.

---

* All parties are listed in the caption.

OPINION BELOW

The Decision of the United States Court of Appeals for the Ninth Circuit is unreported.

JURISDICTION OF THE UNITED STATES SUPREME COURT

The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit (Appendix, page 2a) was entered on April 12, 1991.

A timely petition for rehearing was denied on June 25, 1991. (Appendix, page 1a)

The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Seventh Amendment to the Constitution of the United States, US Const, Amend 7, which provides as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

This case also involves Rules 38 (a) to (c) and 39 (a) of the Federal Rules of Civil Procedure which provide as follows:

> **Rule 38. Jury Trial of Right**
>
> **(a) Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Demand: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

Rule 39. Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

STATEMENT OF THE CASE

This case involves Petitioner's unsuccessful attempt, thus far, to obtain a jury trial on a Cross-Claim which resulted in a judgment for $300,000 in damages as requested in the Cross-Claim and which involved factual issues as to whether an oral settlement agreement existed between Petitioner Thomas W. Devaney and Respondent Xerox Corporation.

Comdisco, a finance and leasing company, filed suit against various defendants, including Xerox for various contract and tort actions.

Xerox, through its in-house counsel, took the lead in, and assumed the liability for, structuring a settlement agreement with Comdisco on behalf of all defendants, including Petitioner. On March 9, 1989, Xerox negotiated an agreement with Comdisco by which Xerox obligated itself to pay Comdisco $1,875,000 in settlement and reserved the right to obtain contributions from its co-defendants. Also on March 9, 1989, in an effort to buy his peace, Petitioner made an offer of contribution to the Xerox settlement with Comdisco for $100,000 cash and a promissory note of $200,000.

On March 16, 1989, the same day that Xerox's management approved the tentative settlement, Xerox counsel made a telephone call to Petitioner's counsel with a counteroffer demanding that Petitioner give Xerox a stipulated judgment whereby, in case of default, Petitioner would pay the entire $1,875,000. Xerox also demanded that Petitioner stipulate to a fraud judgment to avoid any bankruptcy discharge. Petitioner's counsel responded that the Xerox counter-offer would probably be rejected.

On March 17, 1989, Comdisco's management approved the tentative settlement. Comdisco agreed to dismiss with prejudice its lawsuit against all defendants, including Petitioner. As part of the Xerox settlement with Comdisco, Comdisco assigned its causes of action against Petitioner to Xerox.

The Xerox counteroffer was rejected by Petitioner on Monday, March 20, 1989. Later, the same day, after Petitioner specifically rejected the Xerox counteroffer, Xerox counsel tried to accept Petitioner's March 8, 1989 offer which had already been rejected by the March 16, 1989 Xerox counteroffer.

The trial court approved the settlement on March 21, 1989 as to all parties except Petitioner.

On March 22, 1989, Xerox corporation filed a Cross-Claim against Petitioner for specific performance of Petitioner's alleged agreement to contribute $300,000 to the $1,875,000 settlement. (Appendix, page 6a)

The record reflects the following between the District Court Judge and Petitioner's counsel:

> THE COURT: The contract action — do you want a jury on the contract action, Mr. Kosnett?
>
> MR. KOSNETT: Yes your Honor.
>
> THE COURT: I think he's entitled to the jury on the contract cause of action. You have a jury.

(Appendix, page 5a)

Petitioner filed and served a written demand for a jury trial on March 28, 1989. (Appendix, page 11a)

One month later, on April 28, 1989, the trial court granted a Xerox motion to strike Petitioner's demand for jury trial. (Appendix, page 12a)

On June 21, 1989, a one-day trial was held without the jury demanded by Petitioner on the basis that the Xerox Cross-Claim for specific performance was entirely equitable in nature. Judgment was granted for Xerox and against Petitioner. (Appendix, page 20a) The trial court entered Findings of Fact and Conclusions of Law on July 31, 1989. (Appendix, page 14a)

Jurisdiction of the United States District Court

The United States District Court for the Central District of California had jurisdiction of the subject matter of the action pursuant to 28 U.S.C. § 1331 in that the matter in controversy exceeded the value of $50,000, exclusive of interest and costs, and was between citizens of different States.

ARGUMENT

Petitioner's request for a review on writ of certiorari should be granted because the District Court and the United States Court of Appeals for the Ninth Circuit have decided a federal question in a way that conflicts with applicable decisions of the United States Supreme Court.

The right to a jury trial is of "historic and continuing strength", *Simler v. Conner,* 372 U.S. 221, 9 L.Ed.2d 691, 83 S.Ct. 609 (1963), and a fundamental right which the United States Supreme Court has safeguarded in similar cases despite attempts to defeat such right by the use of equitable devices such as declaratory relief and injunction, *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 3 L.Ed.2d 988, 79 S.Ct. 948 (1959); accounting on a contract claim, *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 8 L.Ed.2d 44, 82 S.Ct. 984 (1962); quiet title, *Meeker v. Ambassador Oil Corp.,* 308 F.2d 875 (10th Cir. 1962); and a stockholder's right to sue in a derivative action, *Ross v.*

Bernard, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970).

Because Xerox sought and obtained specific performance requiring the payment of damages instead of a judgment for damages, Petitioner was denied his constitutional right to a trial by jury to determine the threshold issue of whether there was in fact a contract to enforce, and if so, the terms and conditions of such contract.

Only if a jury determined that a contract existed could the trial court then exercise its equitable power to determine if it should be specifically enforced. It was for the jury to determine what the parties said, what their intent was, and whether a contract indeed existed.

The MEMORANDUM decision of the United States Court of Appeals for the Ninth Circuit affirmed the District Court denial of a jury trial on the basis that the District Court accepted Xerox's characterization that the March 16, 1989 conversation was a mere inquiry by Xerox regarding additional security rather than a counteroffer constituting a rejection of Petitioner's offer and that the Xerox action for specific performance did not have a claim for damages and was therefore a purely equitable one which was properly tried to the court.

On petition for rehearing, Petitioner cited the record before the trial court which showed that the Xerox Cross-Claim raised both legal and equitable issues and the District Court judgment was that "Thomas W. Devaney shall pay Xerox Corporation $300,000 . . .".

The petition for rehearing was denied, without comment, on June 25, 1991.

Contract claims are historically legal issues which entitled Petitioner to a jury trial. *Baltimore & Carolina Line,*

Inc. v. Redman, 295 U.S. 654, 657-58, 55 S.Ct. 890, 891-92, 79 L.Ed. 1636 (1935).

In *Ross v. Bernhard,* 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.3d 729 (1970), the United States Supreme Court set forth the governing principle:

> [W]here equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed . . . by trying the legal issues as incidental to the equitable ones . . . The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.

CONCLUSION

The Court should review this case because the lower courts have decided an important federal question which conflicts with applicable decisions of the United States Supreme Court which recognize the historic and continuing strength of a trial by jury of legal issues even when arising from a claim for, or relating to, equitable relief.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES T. ROSE
Counsel of Record for
Petitioner Thomas W. Devaney
2049 Century Park East, Suite 1200,
Los Angeles, California 90067
213/788-0535

APPENDIX

	Page
US Court of Appeals for the Ninth Circuit	
— Order Dated June 25, 1991 Denying Petition for Rehearing	1a
— Memorandum Decision Dated April 12, 1991	2a
US District Court	
— Partial Reporter's Transcript for March 21, 1989	5a
— Cross-Claim Dated March 22, 1989	6a
— Demand for Jury Trial Dated March 28, 1989	11a
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CA No. 89-55982
DC No. 86-7751-WDK

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMDISCO, INC.,
a Delaware corporation,
Plaintiff,

v.

XEROX CORPORATION,
a New York corporation,
Defendant-Cross-Claimant/Appellee,

v.

THOMAS W. DEVANEY,
Defendant-Cross-Defendant/Appellant.

ORDER

BEFORE: HUG, CANBY and WIGGINS, Circuit Judges.

The petition of appellant Devaney for rehearing is DENIED.

No. 89-55982
D.C. No. 88-7751-WDK

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COMDISCO, INC.,
a Delaware Corporation,
Plaintiff,

v.

XEROX CORPORATION,
a New York corporation,
Defendant-Cross-Claimant/Appellee,

v.

THOMAS W. DEVANEY,
Defendant-Cross-Defendant/Appellant.

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding
Argued and Submitted November 6, 1990
Pasadena, California

MEMORANDUM*

Before: HUG, CANBY and WIGGINS, Circuit Judges.

Thomas Devaney appeals from the judgment of the district court for Xerox and against Devaney for specific

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

performance of a global settlement agreement among Comdisco, Devaney, Xerox, and others. Devaney also appeals the district court's denial of his request for a jury trial. We affirm.

Devaney argues that Xerox rejected his settlement offer on March 16, 1989, by proposing a "counter-offer". Xerox asserts that its communication constituted an acceptance with a mere inquiry regarding additional security, thus binding Devaney to the terms of his settlement offer. We agree with the district court that Devaney's March 8, 1989, settlement offer was not rejected by Xerox's March 16, 1989, inquiry.

Under California law, a valid "acceptance must be absolute and unqualified." Cal. Civ. Code § 1585. A qualified acceptance constitutes a rejection terminating the offer; it is a new proposal or counter-offer which must be accepted by the former offeror now turned offeree before a binding contract results. *Glende Motor Co. v. Superior Court,* 159 Cal. App. 3d 389, 395, 205 Cal. Rptr. 682, 686 (1984). This rule, however, should be applied so as not to stifle settlement negotiations. *Id.* at 398, 205 Cal. Rptr. at 688 n.12. "A mere inquiry regarding the possibility of different terms, a request for a better offer, or a comment upon the terms of the offer, is ordinarily not a counter-offer." *Id.* (citing Restatement (Second) of Contracts, § 39, comment b).

In the present case, the communications between Xerox and Devaney were oral, and each party subsequently interpreted the communications to its own advantage. The district court accepted Xerox's characterization that the March 16th conversation relating to Devaney's willingness to stipulate to a judgment was a mere inquiry by Xerox, not constituting a rejection of Devaney's settlement offer. The surrounding circumstances support this

characterization and we accept it. Once that determination is made, the evidence permits no conclusion other than that Xerox had accepted Devaney's offer by March 16th, 1989.[1]

Devaney also contends that the district court erred in denying his request for a jury trial of Xerox's cross-claim against him for specific performance of the settlement agreement with Comdisco.[2] The district court properly denied this request.

Where an action is wholly for equitable relief, there is no right to a jury trial. Fed. R. Civ. P. 39(a). Xerox's action for specific performance without a claim for damages is purely equitable and was properly tried to the court. *See Adams v. Johns-Manville Corp.*, 876 F.2d 702, 709 (9th Cir. 1989). This is so even though Devaney, the party resisting specific enforcement, disputes the formation of the contract. *Id.* at 710 (citations omitted).

The judgment of the district court is AFFIRMED.

---

[1]In light of our resolution of this issue, we find it unnecessary to address Xerox's argument based on promissory estoppel.

[2]The right to a jury trial in federal court is to be determined as a matter of federal law. *Byrd v. Blue Rural Electric Cooperative, Inc.*, 356 U.S. 525, 538-40 (1957).

No. 86-7751-WDK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WILLIAM D. KELLER, JUDGE PRESIDING

COMDISCO, INC., a Delaware corporation,

Plaintiff,

vs.

THOMAS W. DEVANEY, et al.

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, March 21, 1989

LORAINE M. DALEY, CSR, RPR
Official Court Reporter
453 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 620-9001

THE COURT: The contract action — do you want a jury on the contract action, Mr. Kosnett?

MR. KOSNETT: Yes, your Honor.

THE COURT: I think he is entitled to the jury on the contract cause of action. You have a jury.

LATHAM & WATKINS
Alan N. Halkett
Paul M. Van Arsdell, Jr.
Michael K. Grace
555 South Flower Street
Los Angeles, California 90071-2466
(213) 485-1234
Attorneys for Xerox Corporation

CIVIL NO. 86-7751-WDK (Gx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COMDISCO, INC., a Delaware corporation,
Plaintiff,
v.
THOMAS W. DEVANEY, *et al.*,
Defendants;

XEROX CORPORATION, a New York corporation,
Cross-Complainant,
v.
THOMAS W. DEVANEY,
Cross-Defendant;

AND RELATED CROSS-ACTION.

CROSS-CLAIM FOR SPECIFIC PERFORMANCE OF SETTLEMENT AGREEMENT

Xerox Corporation ("Xerox"), a New York corporation, for its cross-claim against cross-defendant Thomas W. Devaney ("Devaney") alleges as follows:

CROSS-CLAIM
(Specific Performance of Settlement Agreement)

1. Xerox was and now is a New York corporation duly organized and existing under and by virtue of the laws of the State of New York with its principal place of business in Stamford, Connecticut.

2. Xerox is informed and believes that Devaney is, and at all times mentioned herein was, an individual residing in Los Angeles, California and a citizen of California.

3. This Court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. § 1332 in that the matter in controversy exceeds the value of $10,000, exclusive of interest and costs, and is between citizens of different States, and venue exists in this judicial district pursuant to 28 U.S.C. § 1391 in that the claim asserted herein arose in this judicial district and the cross-claimant and cross-defendant reside or do business therein.

4. On or about March 8, 1988, Xerox and Devaney entered into an oral agreement in Los Angeles, California whereby Devaney agreed, contingent only on and as part of a global settlement of the principal action brought by plaintiff Comdisco, Inc. ("Comdisco"), to pay to Xerox $300,000 as follows: $100,000 on or before April 15, 1989 and $200,000 pursuant to a promissory note in the amount of $200,000 payable to the order of Xerox Corporation over three years at 12% interest and secured by a deed of trust on Mr. Devaney's personal residence. Devaney further agreed to exchange releases with Comdisco, Xerox, its employee, Reginald St. Claire, and the other settling defendants. In return, Xerox agreed to meet with representatives of Comdisco and attempt to reach a suitable global settlement in which Comdisco would dismiss with prejudice all claims in this case against all defendants

therein, including Devaney, and all settling defendants would execute appropriate general releases in favor of Devaney and certain other settling defendants.

5. On March 9, 1989 in reliance on Mr. Devaney's agreement, Xerox negotiated a global settlement agreement with Comdisco in which Xerox agreed to pay $1,875,000 to Comdisco on certain terms and Comdisco agreed to dismiss with prejudice its lawsuit against all defendants, including Devaney.

6. On or about March 17, 1989, Xerox and Comdisco entered into the global settlement negotiated on March 9, 1989. Counsel for Xerox notified Mr. Devaney's counsel on March 17, 1989 that the proposed settlement was approved by Xerox and Comdisco.

7. On or about March 20, 1989, Devaney's counsel telephoned Xerox's counsel and stated that Devaney had withdrawn his "offer" and would not make any of the payments to Xerox that he previously agreed to make as part of the global settlement.

8. The value of the consideration to Devaney of dismissal with prejudice of Comdisco's claims against Devaney and releases in favor of Devaney by all settling parties was not less than the value of the payments Devaney agreed to make to Xerox, and the agreement between Xerox and Devaney is just and reasonable as to Devaney.

9. Xerox has performed all conditions, covenants and promises required by it to be performed in accordance with the terms and conditions of its agreement with Devaney, except execution and delivery of its release in favor of Devaney, which Xerox is excused from delivering by Devaney's anticipatory repudiation of his obligation to pay Xerox $300,000.00. Xerox stands ready, willing, and

able to perform all of its obligations to Devaney under its agreement with him.

10. Xerox has no adequate legal remedy for Devaney's breach, because monetary damages, if awarded, would be inadequate compensation for Devaney's refusal to make the promised payments to Xerox and to execute and deliver appropriate general releases to Xerox and all other settling defendants as agreed.

WHEREFORE, Xerox prays for judgment as follows:

1. That Devaney be ordered to pay Xerox $300,000 and to execute and deliver a general release in favor of Xerox and Reginald St. Claire or, in the alternative, to pay to Xerox $100,000 on or before April 17, 1989 and to execute and deliver on or before April 17, 1989 (A) a promissory note in form and substance reasonably satisfactory to Xerox in the amount of $200,000 payable to the order of Xerox Corporation at 12% per annum over three years, (B) a deed of trust on Devaney's personal residence in form and substance reasonably satisfactory to Xerox in order to secure performance of his obligations under such promissory note, and (C) a general release in form and substance reasonably satisfactory to Xerox in favor of Xerox and Reginald St. Claire;

2. For interest thereon from the date of breach at the highest rate permitted by law;

3. For Xerox's costs of suit and its attorneys' fees incurred herein; and

4. For such other and further relief as the court may deed proper.

DATED: March 22, 1989

LATHAM & WATKINS
ALAN N. HALKETT
PAUL M. VAN ARSDELL, JR.
MICHAEL K. GRACE

By MICHAEL K. GRACE
Michael K. Grace
Attorneys for Cross-Claimant
Xerox Corporation

JAMES V. KOSNETT
5900 Wilshire Boulevard, Suite 1710
Los Angeles, California 90036
(213) 935-0993
Attorney for Defendant and Cross-Defendant
THOMAS W. DEVANEY

CIVIL NO. 86-7751-WDK(Gx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COMDISCO, INC., a Delaware corporation,
Plaintiff,

v.

THOMAS W. DEVANEY, et al.,
Defendants;

XEROX CORPORATION, a New York corporation
Cross-Complainant,

v.

THOMAS W. DEVANEY,
Cross-Defendant;

AND RELATED CROSS-ACTION

DEMAND FOR JURY TRIAL

COMES NOW Cross-Defendant THOMAS W. DEVANEY and hereby demands a jury trial on the Cross-Claim of Cross-Complainant XEROX CORPORATION.

DATED: March 28, 1989

Respectfully submitted,

James V. Kosnett
Attorney for Cross-Defendant

No. CV 86-7757-WDK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Date 4/28/89

COMDISCO, INC. v. THOMAS W. DEVANEY, et al.

PRESENT: HON. WILLIAM D. KELLER, JUDGE; SARA WONG, DEPUTY CLERK.

ATTORNEYS PRESENT FOR PLAINTIFFS: NONE PRESENT; ATTORNEYS PRESENT FOR DEFENDANTS: NONE PRESENT.

PROCEEDINGS: This matter is before the Court on cross-complainant Xerox Corporation's motion to strike cross-defendant Devaney's demand for a jury trial. Xerox Corporation's cross-claim is for specific performance of a settlement agreement.

The seventh amendment preserves the right to a jury trial as it existed at common law. U.S. Const. amend. VII. There is no right to a jury at common law in a purely equitable action. *Medtronic, Inc. v. Benda*, 689 F.2d 645, 660 (7th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983). An action for specific performance without damages, such as the cross-claim asserted here, is purely equitable. *Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.*, 610 F.2d 1185, 1189 (3d Cir. 1979). As a result, cross-defendant Devaney has no right to a jury trial in the cross-action. The Court hereby STRIKES cross-defendant Devaney's demand for a jury trial in the cross-claim for specific performance of the settlement agreement.

After examining the transcript of the March 21, 1989 hearing, the Court concludes that cross-defendant has a

good faith belief that the Court ordered a jury pursuant to Fed. R. Civ. P. 39(b). Although no such order was made by the Court, there was sufficient ambiguity in the Court's statements to warrant such a belief. For the foregoing reasons, cross-claimant Xerox Corporation's request for sanctions is hereby DENIED.

cc: counsel of record

LATHAM & WATKINS
Alan N. Halkett
Michael K. Grace
555 South Flower Street
Los Angeles, California 90071-2466
(213) 485-1234
Attorneys for Xerox Corporation

CIVIL NO. 86-7715-WDK (Gx)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

COMDISCO, INC., a Delaware corporation,
Plaintiff,
v.
THOMAS W. DEVANEY, *et al.,*
Defendants;

XEROX CORPORATION, a New York corporation,
Cross-Complainant,
v.
THOMAS W. DEVANEY,
Cross-Defendant.

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following a trial before this Court without a jury of the cross-claim brought by Cross-Complainant Xerox Corporation ("Xerox") against Cross-Defendant Thomas W. Devaney ("Devaney") for specific performance of a settlement agreement concerning the action before this court entitled *Comdisco, Inc. v. Thomas W. Devaney, et al.,* Civ.

No. 86-7751-WDK (Gx), this Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. Xerox is a New York corporation duly organized and existing under and by virtue of the laws of the State of New York with its principal place of business in Stamford, Connecticut.

2. Mr. Devaney is an individual residing in Los Angeles, California and a citizen of California.

3. This Court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. § 1332 in that the matter in controversy exceeds the value of $50,000, exclusive of interest and costs, and is between citizens of different States, and venue exists in this judicial district pursuant to 28 U.S.C. § 1391 in that the claim asserted herein arose in this judicial district and Xerox and Mr. Devaney reside or do business therein.

4. On February 17, 1989, Mr. Devaney through his counsel, James V. Kosnett, offered to contribute $25,000 toward a global settlement of the case. This offer subsequently was increased to $50,000 in late February, 1989.

5. On March 7, 1989, with the approval of his attorney, Mr. Devaney called Paul M. Van Arsdell, Jr., counsel for Xerox, and another Xerox attorney and offered to pay $100,000 to Xerox and to execute a $200,000 promissory note payable to Xerox as his contribution to the global settlement of the case before this Court brought by Comdisco, Inc.

6. On March 8, 1989, Mr. Kosnett and Mr. Van Arsdell, Jr., Michael K. Grace, Xerox' outside counsel, and Alfred H. Hoddinott, Jr., Xerox in-house counsel, dis-

cussed a possible global settlement of the case by teleconference. Through his attorney, Mr. Devaney subsequently made a last and final offer to Xerox' attorneys on March 8, 1989 to contribute the following sums as part of a global settlement in which all parties would bear their own costs and attorneys' fees and exchange mutual general releases:

(a) $100,000 payable in cash to Xerox on or before April 15, 1989; and

(b) $200,000 payable to Xerox pursuant to a three-year promissory note at 12% interest per annum secured by a deed of trust on realty owned by Mr. Devaney in Los Angeles County.

7. On March 8, 1989, Mr. Van Arsdell communicated the terms of that offer to Mr. Hoddinott, who was preparing to negotiate a settlement with Comdisco, Inc.

8. On March 9, 1989, in reliance on Mr. Devaney's offer, Mr. Hoddinott on behalf of Xerox negotiated a tentative settlement agreement with Comdisco in Rosemont, Illinois in which Xerox agreed to pay $1,875,000 to Comdisco over two and one-half years and Comdisco agreed to dismiss with prejudice its lawsuit against all defendants, including Mr. Devaney. The tentative settlement was contingent only upon management approval by Xerox and Comdisco.

9. On March 9, 1989, Xerox' counsel notified Mr. Devaney's counsel and all other defense counsel of the tentative settlement.

10. On March 10, 1989, Mr. Hoddinott informed Xerox' management of the terms of the tentative settlement, specifically including the fact that Xerox would receive the contributions offered by Mr. Devaney and the

other defendants, and informed Xerox' management of the amount of each contribution.

11. On March 16, 1989, Xerox' management approved the tentative settlement. Xerox' counsel notified Mr. Devaney's counsel and all other counsel by telephone of that approval by Xerox' management.

12. In the March 16, 1989 telephone call between Xerox' counsel and Mr. Devaney's counsel, Xerox' counsel inquired whether Mr. Devaney would consent to a stipulated judgment for fraud in the amount of $1,875,000 to secure his promise to pay $100,000 to Xerox. Xerox' prior acceptance of the global settlement and Mr. Devaney's contribution thereto was not conditioned on Mr. Devaney's acceptance of Xerox' proposal for additional security in the form of a stipulated judgment. Mr. Devaney's counsel said he would discuss the matter with his client.

13. On March 17, 1989, Comdisco's management approved the tentative settlement, and a contract was formed by and among Comdisco, Inc., Xerox Corporation, Reginald St. Claire, Thomas W. Devaney, Ladd Cameron, Terrence Quinn, and Central Management Corporation, the terms of which are stated in the March 17, 1989 letter from Mr. Hoddinott to Comdisco. The agreement settled all claims in the principal action in this case brought by Comdisco and incorporated as one of its terms Mr. Devaney's contribution. Xerox's counsel telephoned all defense counsel on March 17, 1989 to set up a time for a hearing before this Court to read the settlement into the record. Mr. Kosnett was not available and Mr. Van Arsdell left a message with Mr. Kosnett's office informing him of the completed settlement and requesting his availability for the Court hearing to be scheduled.

14. On March 20, 1989, Mr. Kosnett telephoned Mr. Van Arsdell and said that Mr. Devaney considered Xerox' inquiry about a stipulated judgment to be a counteroffer and a rejection of Mr. Devaney's original offer to contribute. Mr. Kosnett stated that Mr. Devaney would not renew his contribution offer and would not make any of the payments to Xerox that he previously offered to make as part of the global settlement.

15. The value of the consideration to Mr. Devaney of dismissal with prejudice of Comdisco's claims against Mr. Devaney and releases in favor of Mr. Devaney by all settling parties is not less than the value of the payments Mr. Devaney offered to contribute, and the settlement agreement is just and reasonable as to Mr. Devaney.

II. CONCLUSIONS OF LAW

1. As of March 9, 1989, when Xerox had negotiated a tentative settlement that included the contribution offered by Mr. Devaney, the doctrine of promissory estoppel prohibited Mr. Devaney from withdrawing his offer while the settlement was pending.

2. As of March 16, 1989, when Xerox' management approved the tentative settlement that included the contribution offered by Mr. Devaney, the doctrine of promissory estoppel prohibited Mr. Devaney's offer from being withdrawn while the settlement was pending.

3. Devaney breached his contract with Xerox and the other settling parties on March 20, 1989 by declaring that he would not make the promised payments to Xerox and by refusing to deliver the promised releases to all settling parties.

4. Specific performance of Mr. Devaney's promised contribution to the global settlement should be ordered by this Court.

5. Any finding of fact herein deemed to be a conclusion of law is hereby made a conclusion of law. Any conclusion of law herein deemed to be a finding of fact is hereby made a finding of fact.

IT IS SO ORDERED.

DATED: 7/27/89 WILLIAM D. KELLER
United States District Judge

Submitted By:

LATHAM & WATKINS
ALAN N. HALKETT
MICHAEL K. GRACE

By MICHAEL K. GRACE
Michael K. Grace
Attorneys for Cross-Claimant
Xerox Corporation

LATHAM & WATKINS
Alan N. Halkett
Paul M. Van Arsdell, Jr.
Michael K. Grace
555 South Flower Street
Los Angeles, California 90071-2466
(213) 485-1234
Attorneys for Xerox Corporation

CIVIL NO. 86-7751-WDK (Gx)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

COMDISCO, INC., a Delaware corporation,
Plaintiff,
v.
THOMAS W. DEVANEY, *et al.*,
Defendants;

XEROX CORPORATION, a New York corporation,
Cross-Complainant,
v.
THOMAS W. DEVANEY,
Cross-Defendant;

AND RELATED CROSS-ACTIONS.

[PROPOSED] JUDGMENT AND ORDER GRANTING SPECIFIC PERFORMANCE

Following the trial without a jury of the cross-claim for specific performance of a settlement agreement brought by Xerox Corporation ("Xerox") against Thomas W. Devaney ("Devaney") and after making the findings and

conclusions as set forth in Findings of Fact and Conclusions of Law of even date herewith, this Court rules that justice requires that Devaney make his promised contribution to the global settlement of this case under the doctrine of promissory estoppel, and further that Devaney breached the settlement agreement in this case on March 20, 1989 and orders specific performance of the settlement agreement as follows:

1. Thomas W. Devaney shall pay Xerox Corporation $300,000 as follows: (A) $100,000 in cash or certified check on or before 30 days after entry of this judgment by the Court, and (B) $200,000 pursuant to a secured promissory note (in the form attached hereto as Exhibit A) in the face amount of $200,000 payable to the order of Xerox Corporation at 12% per annum over three years and secured by a deed of trust (in the form attached hereto as Exhibit B) for the benefit of Xerox on Mr. Devaney's Los Angeles County realty.

2. Devaney shall execute and deliver to Xerox a general release in favor of Xerox, Reginald St. Claire, Comdisco, Inc., Terrence Quinn, Ladd Cameron, and Central Management Corporation in the form attached hereto as Exhibit C.

3. Each party shall bear its own costs and attorneys' fees incurred in this case.

4. This Court shall retain jurisdiction over this case to enforce the terms of this judgment and order.

IT IS SO ORDERED.

DATED: 7/27/89

WILLIAM D. KELLER
United States District Judge

Presented by:
LATHAM & WATKINS
ALAN N. HALKETT
PAUL M. VAN ARSDELL, JR.
MICHAEL K. GRACE

BY MICHAEL K. GRACE
Michael K. Grace
Attorneys for Xerox Corporation

(2)

No. 91-454

FILED
OCT 21 1991
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

THOMAS W. DEVANEY,
Petitioner,
vs.
XEROX CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAX L. GILLAM*
MICHAEL K. GRACE
MARK B. ABBOTT
LATHAM & WATKINS
633 West Fifth Street
Suite 4000
Los Angeles, California 90071
(213) 485-1234
Attorneys for Respondent.

* Counsel of Record

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

24

QUESTION PRESENTED

Was Petitioner entitled to trial by jury on the equitable cross-claim brought by Respondent for specific enforcement of a settlement agreement?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
THE OPINION BELOW AND THIS COURT'S JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
United States Constitution, Seventh Amendment	2
Federal Rules of Civil Procedure, Rule 38(a)	2
Federal Rules of Civil Procedure, Rule 39(a)	2
STATEMENT OF THE CASE	3
REASONS WHY REVIEW SHOULD BE DENIED	4
CONCLUSION	6
APPENDIX A	7
APPENDIX B	13
APPENDIX C	18

TABLE OF AUTHORITIES

Cases

	Page
Adams v. Johns-Manville Corp., 876 F.2d 702 (9th Cir. 1989)	5
Beacon Theatres, Inc. v. Westover, 359 U.S. 500, S. Ct. 948, 3 L.Ed.2d 988 (1959)	6
Curtis v. Loether, 415 U.S. 189, 94 S. Ct. 1005, 39 L.Ed.2d 260 (1974)	5, 6
Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S. Ct. 894, 8 L.Ed.2d 44 (1962)	6
Ford v. Citizens and So. Nat'l Bank, 928 F.2d 1118 (11th Cir. 1991)	5
King v. Hamilton, 29 U.S. (4 Pet.) 311, 7 L.Ed. 869 (1830)	4
Klein v. Shell Oil Co., 386 F.2d 659 (8th Cir. 1967)	5
Kukla v. National Distillers Products Co., 483 F.2d 619 (6th Cir. 1965)	5
Medtronic, Inc. v. Benda, 689 F.2d 645 (7th Cir. 1982), *cert. denied*, 459 U.S. 1106, 103 S. Ct. 731, 74 L.Ed.2d 955 (1983)	5
Owens-Illinois, Inc. v. Lake Shore Land Co., Inc., 610 F.2d 1185 (3d Cir. 1979)	5
Read v. Baker, 438 F. Supp. 737 (1977), *aff'd*, 577 F.2d 728 (1st Cir.), *cert. denied*, 439 U.S. 869, 99 S. Ct. 197, 58 L.Ed.2d 180 (1978)	5
Ross v. Bernhard, 396 U.S. 531, 90 S. Ct. 733, 24 L.Ed.2d 729 (1970)	6
Warner v. Rossignol, 513 F.2d 678 (1st Cir. 1975)	5
Xerox Corp. v. Devaney, CA No. 89-55982 (9th Cir. 1991) (mem. op.)	1, 6

TABLE OF AUTHORITIES

United States Constitution

	Page
United States Constitution, Seventh Amendment..	2

Statutes

United States Code, Title 28	
Section 1254(1)	2
Section 2101(c)	2

Rules

Supreme Court Rules	
Rule 10	6
Rule 13.1	2
Rule 29.1	1
Federal Rules of Civil Procedure	
Rule 38	2
Rule 38(a)	2
Rule 39(a)	2

No. 91-454

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THOMAS W. DEVANEY,
Petitioner,
vs.
XEROX CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Xerox Corporation ("Xerox")[1] respectfully requests that this Court deny the petition of Thomas W. Devaney for a writ of certiorari because the Ninth Circuit's memorandum decision applies existing precedent to the facts of the case and presents no novel legal analysis warranting this Court's review.

THE OPINION BELOW AND THIS COURT'S JURISDICTION

Mr. Devaney seeks review of the Ninth Circuit's unpublished memorandum decision in *Xerox Corp. v. Devaney*, CA No. 89-55982 (9th Cir. 1991) (mem. op.), filed on

[1]Pursuant to Supreme Court Rule 29.1, a list naming all parent companies and subsidiaries (except wholly owned subsidiaries) of Xerox is attached as Appendix A to this brief.

April 12, 1991. Mr. Devaney's petition for rehearing was denied on June 25, 1991. Mr. Devaney then filed a petition with this Court for a writ of certiorari on September 16, 1991. This Court has jurisdiction over the petition pursuant to 28 U.S.C. § 1254(1). The petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rules of Civil Procedure, Rule 38(a):

(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Federal Rules of Civil Procedure, Rule 39(a):

(a) **By Jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

STATEMENT OF THE CASE

Mr. Devaney's petition challenges the memorandum decision of the Ninth Circuit Court of Appeals, which affirmed the trial court's denial of a jury trial in an equitable action for specific performance of a settlement agreement. Contrary to the position asserted by Mr. Devaney in his petition, Xerox's cross-claim for specific enforcement was not "joined" to any other claim, and there was no prayer for damages.

The underlying (settled) case concerned the July, 1986 purchase by Comdisco, Inc., a computer leasing company, of 534 document facsimile transmission systems from Ladd Cameron, one of Mr. Devaney's agents, and the simultaneous lease of these systems by Comdisco to a partnership controlled by Mr. Devaney. Comdisco wired $3,249,000 to a bank account jointly held by Devaney and Cameron. On the next day, Devaney wrote a $2,400,000 check to a corporation controlled by him. That money has never been recovered. Comdisco's subsequent investigation revealed that Cameron ordered over $1,200,000 of computer hardware and facsimile units from Xerox, that he paid Xerox only $600,000, and that the 534 document facsimile transmission systems which Comdisco thought it had bought had never existed. Comdisco filed suit against Devaney, Cameron, and Devaney's companies for fraud and breach of contract. In a third amended complaint filed over a year later, Comdisco named Xerox and a Xerox employee as defendants for allegedly assisting Devaney in his fraud.

After extensive negotiations among the parties over several months, a global settlement agreement was reached on March 17, 1989 that resolved that complex lawsuit and avoided a lengthy trial. Three days after being told that the global settlement had been approved

by all parties, Mr. Devaney reneged on his agreement to contribute to the settlement $100,000 in cash and execute and deliver a $200,000 promissory note, a deed of trust securing the note, and general releases for the benefit of the other parties. On March 22, 1989, Xerox filed an equitable action against Mr. Devaney alleging a single cross-claim for specific performance of a settlement agreement. Appendix B.

On March 28, 1989, Devaney filed a demand for jury trial. Xerox filed a motion to strike Devaney's jury de mand on the grounds that the cross-claim was an equita ble action for which no right to trial by jury existed. After reviewing the transcript of the settlement conference in which Devaney repudiated the settlement agreement, the court confirmed that no jury trial had been ordered on Xerox's cross-claim for specific performance and granted Xerox's motion in a written order filed April 28, 1989. Appendix C.

A one-day bench trial took place on June 20, 1989, in which Mr. Devaney and his lawyer testified. At the end of the trial, the Court determined that the settlement was just and fair as to Mr. Devaney and ordered specific performance of the settlement agreement.

REASONS WHY REVIEW SHOULD BE DENIED

Devaney's petition should be denied because the Ninth Circuit's memorandum decision follows existing precedent in the Ninth Circuit and other circuits and does not present an important question of federal law unresolved by this Court.

An action for specific performance of a contract lies in equity. *King v. Hamilton*, 29 U.S. (4 Pet.) 311, 7 L.Ed. 869 (1830). The circuits are in agreement that there is no

right to trial by jury in an action for specific performance of a contract. *See e.g., Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.*, 610 F.2d 1185, 1189 (3d Cir. 1979) ("An action for specific performance without a claim for damages is purely equitable and historically has always been tried to the court"); *Medtronic, Inc. v. Benda*, 689 F.2d 645, 660 (7th Cir. 1982), *cert. denied,* 459 U.S. 1106, 103 S. Ct. 731, 74 L.Ed.2d 955 (1983) (no right to jury trial in action for specific performance); *Klein v. Shell Oil Co.*, 386 F.2d 659, 663 (8th Cir. 1967) (no right to jury trial in action for specific performance).

All of the circuits that have addressed whether a right to jury trial exists in an action for specific enforcement of a settlement agreement uniformly have held that there is no such right. *See Warner v. Rossignol*, 513 F.2d 678, 683-684 (1st Cir. 1975); *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 709 (9th Cir. 1989); and *Ford v. Citizens and So. Nat'l Bank*, 928 F.2d 1118, 1121-1122 (11th Cir. 1991); *see also, Read v. Baker*, 438 F. Supp. 737, 741 (1977), *aff'd*, 577 F.2d 728 (1st Cir.), *cert. denied*, 439 U.S. 869, 99 S. Ct. 197, 58 L.Ed.2d 180 (1978) (referring to the "Court's inherent power to enforce in equity a settlement agreement entered into between the parties litigant in the underlying pending case"); and *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 621-622 (6th Cir. 1965) (order granting specific performance of settlement agreement remanded to trial court for evidentiary hearing).

The cases cited by Mr. Devaney in his petition do not support his assertion that a right to jury trial exists in an action for specific enforcement of a settlement agreement. In those cases, the Court affirmed the right to jury trial of legal claims *only*, whether alone or joined with an equitable claim. *See e.g., Curtis v. Loether*, 415 U.S. 189, 194, 94

S. Ct. 1005, 1008, 39 L.Ed.2d 260, 266 (1974); *Ross v. Bernhard*, 396 U.S. 531, 537-538, 90 S. Ct. 733, 738, 24 L.Ed.2d 729, 736 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473, 82 S. Ct. 894, 897, 8 L.Ed.2d 44, 48 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-511, 79 S. Ct. 948, 956-957, 3 L.Ed.2d 988, 997 (1959). There is no right to jury trial in an equitable action for specific performance of a settlement agreement.

CONCLUSION

Simply stated, this case is about a party who made a deal to settle a suit for fraud, "welshed" on the deal, and now has been ordered to perform his agreement. Supreme Court Rule 10 provides that "special and important reasons" are needed for a petition for a writ of certiorari to be granted, including resolving a conflict among the circuits or presenting an important question of federal law that has not been addressed by this Court. This case meets neither test. The memorandum decision in *Xerox Corp. v. Devaney* correctly applies existing precedent to the facts of the case. Xerox therefore respectfully requests that Mr. Devaney's petition for a writ of certiorari be denied.

DATED: October 11, 1991

Respectfully submitted,

MAX L. GILLAM
MICHAEL K. GRACE
MARK B. ABBOTT
LATHAM & WATKINS
633 West Fifth Street
Suite 4000
Los Angeles, CA 90071
(213) 485-1234

APPENDIX A

LIST OF PARENT COMPANIES AND SUBSIDIARIES

Respondent Xerox Corporation ("Xerox") has no parent company. Xerox has the following subsidiaries, excluding wholly owned subsidiaries:[2]

AMTX, Inc.
Advanced Forming Technology
Xerox Industrial e Comercial S.A.
Xerox do Nordeste S.A.
Xerox do Amazonas S.A.
Century Data Systems, Inc.
Copicentro S.A.
GESCAN International
Image Sciences, Inc.
Katun Corporation
Kurzweil Applied Intelligence
Optimem
Opto Generic Devices, Inc.
Rank Xerox Holding B.V.
Rank Xerox Investments Limited
Investissements Xerographiques Marocains S.A.
Reprographics Egypt Limited
Xerox Egypt S.A.E.
Xerox Maroc S.A.
Xerox Products Limited
R-X Holdings Limited
Xerox Shanghai Limited
Rank Xerox Limited
Fuji Xerox Co., Ltd.

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[2]This List of Parent Companies and Subsidiaries is submitted by Xerox pursuant to Supreme Court Rule 29.1.

Aichi Xerox Co., Ltd.
Aichi-Higashi Xerox Co., Ltd.
Akita Fuji OA Co., Ltd.
Chiba Xerox Co., Ltd.
Fuji System Brain Co. Ltd.
Fuji World Office Machine Co., Ltd.
Fukui Xerox Co., Ltd.
Fukuoka Xerox Co., Ltd.
Fukushima Xerox Co., Ltd.
Gifu Xerox Co., Ltd.
Gunma Xerox Co., Ltd.
Hiroshima Xerox Co., Ltd.
Hokkaido Xerox Co., Ltd.
Hokuriku Xerox Co., Ltd.
Hyogo Xerox Co., Ltd.
Ibaraki Xerox Co., Ltd.
Kagoshima Xerox Co., Ltd.
Kanagawa Xerox Co., Ltd.
Kita Kyushu Xerox Co., Ltd.
Kobas Co. Ltd.
Korea Xerox Co., Ltd.
Kumamoto Xerox Co., Ltd.
Kyoto Xerox Co., Ltd.
Mie Xerox Co., Ltd.
Miyagi Xerox Co., Ltd.
Nagano Xerox Co., Ltd.
Nagaski Xerox Co., Ltd.
Niigata Xerox Co., Ltd.
Okayama Xerox Co., Ltd.
Oita Xerox Co. Ltd.
Okinawa Xerox Co. Ltd.
Osaka Xerox Co., Ltd.
Philippine Fuji Xerox Corp.
Protex Co. Ltd.
Saitama Xerox Co., Ltd.

Sakanao Office Machine Co. Ltd.
SCAN C2C Inc.
Shikoku Xerox Co., Ltd.
Shizuoka Xerox Co., Ltd.
Taiwan Fuji Xerox Corp.
Tama Xerox Co., Ltd.
Technol Co. Ltd.
Thai Xerographic Systems Co., Ltd.
Tochigi Xerox Co., Ltd.
Tokyo Xerox Co., Ltd.
Unisol Inc.
Wakayama Xerox Co. Ltd.
Indian Xerographic Systems Limited
Modi Xerox Limited
Epitec AB
Arguelles
Barcelona Inteligencia Art
Bonanova
Cantabria
Castellon
Castilla Y La Rioja
Cia. Espanola Repro y Serv.
C.L.I.A. S.A.
Cuidad Lineal
Cuzco
Del Guadalquivir
Deusto
Ebro
Helmantica
Layetana
Les Corts
Levante
Llobregat
Los Remedios
Madrid-Sur

Malaga
Mediterraneo
Meridiana
Mestalla
Nervion
Retiro
Salamanca
Sistemas Expertas y Tecnolo
Software Inteligente y Tratemiento Elect de Imp
Vizcaya
Scaitech A/S
Xerox Partner Arhus A/S
Xerox Partner Esbjerg A/S
Xerox Partner Fyn A/S
Xerox Partner Herning A/S
Xerox Partner Horsholm A/S
Xerox Partner Nykobing A/S
Xerox Partner Trommesalen A/S
Xerox Partner Vejle A/S
Asunto Oy Kristiinanvalli
Rank Xerox (Nigeria) Limited
Rank Xerox Portugal Equipamentos de Escritorio, Limitada
Rank Xerox Noleggi SpA
Artificial Intelligence Limited
Badger Office Equipment
Channel Office Systems Limited
Coles Office Equipment Limited
Humberside Business Products Limited
Kernal Technology Limited
Oakley Office Equipment Limited (in liquidation)
SBS Ltd.
Sussex Office Services Limited

Text-Comm Limited
ACT Systemes S.A.
Aqix Sarl
Alsatique
Ardennes Marne Bureatique
Axes Bureautiques Systemes
Axor Bureautique
Axis International
BSC Arve
Bureau Equip'Mans
Bureautique 64
Bureautique 66
Bureautique Distribution
Burobail S.A.
Burocom 42
Burofinance S.A.
C2B Cazaban
C2R Bureautique
Centre Bureautique 49
Centre Bureautique Auvergne
Centre Bureautique Informatique
C K Bureautique
Competence Bureautique
Diffusion Bureautique de la Somme
Espace Bureautique
Franche Comte Bureautique
Informatique Bureautique Charente
Informel SARL
L.A. Bureautique
Nimes Bureautique Communication
RSL Developpement SARL
Omicrome S.A.
Societe Industrielle Rank Xerox S.A.
Secob
Sodevco

Vaucluse Bureautique Service
Vienne Partenaire Bureautique
Selectronics, Inc.
Spectra Diode Laboratories, Inc.
The Genra Group, Inc.
Verbex Voice Systems, Inc.
Xerox de Bolivia Limitada
Xerox Canada Inc.
Teletech Financial Corporation
Xerox Canada Ltd.
Xerox de Colombia S.A.
Compucolsa S.A.
Xerox de El Salvador, S.A. de C.V.
MCM Asia Pacific Company Limited
Xerox Financial Services Life Insurance Company
Xerox de Honduras, S.A.
Avalanche Development Company
Xerox Canada Realty, Inc.
Xerox (Jamaica) Limited
Xerox de Panama, S.A.
Xerox del Peru, S.A.
Xerox Trinidad Limited
Xerox Zona Libre, S.A.

APPENDIX B

LATHAM & WATKINS
Alan N. Halkett
Paul M. Van Arsdell, Jr.
Michael K. Grace
555 South Flower Street
Los Angeles, California 90071-2466
(213) 485-1234
Attorneys for Xerox Corporation

CIVIL NO. 86-7751-WDK (Gx)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COMDISCO, INC., a Delaware corporation,
Plaintiff,
v.
THOMAS W. DEVANEY, *et al.*,
Defendants;

XEROX CORPORATION, a New York corporation,
Cross-Complainant,
v.
THOMAS W. DEVANEY,
Cross-Defendant;

AND RELATED CROSS-ACTION.

CROSS-CLAIM FOR SPECIFIC PERFORMANCE OF SETTLEMENT AGREEMENT

Xerox Corporation ("Xerox"), a New York corporation, for its cross-claim against cross-defendant Thomas W. Devaney ("Devaney") alleges as follows:

CROSS-CLAIM
(Specific Performance of Settlement Agreement)

1. Xerox was and now is a New York corporation duly organized and existing under and by virtue of the laws of the State of New York with its principal place of business in Stamford, Connecticut.

2. Xerox is informed and believes that Devaney is, and at all times mentioned herein was, an individual residing in Los Angeles, California and a citizen of California.

3. This Court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. § 1332 in that the matter in controversy exceeds the value of $10,000, exclusive of interest and costs, and is between citizens of different States, and venue exists in this judicial district pursuant to 28 U.S.C. § 1391 in that the claim asserted herein arose in this judicial district and the cross-claimant and cross-defendant reside or do business therein.

4. On or about March 8, 1988, Xerox and Devaney entered into an oral agreement in Los Angeles, California whereby Devaney agreed, contingent only on and as part of a global settlement of the principal action brought by plaintiff Comdisco, Inc. ("Comdisco"), to pay to Xerox $300,000 as follows: $100,000 on or before April 15, 1989 and $200,000 pursuant to a promissory note in the amount of $200,000 payable to the order of Xerox Corporation over three years at 12% interest and secured by a deed of trust on Mr. Devaney's personal residence. Devaney further agreed to exchange releases with Comdisco, Xerox, its employee, Reginald St. Claire, and the other settling defendants. In return, Xerox agreed to meet with representatives of Comdisco and attempt to reach a suitable global settlement in which Comdisco would dismiss with prejudice all claims in this case against all defendants

therein, including Devaney, and all settling defendants would execute appropriate general releases in favor of Devaney and certain other settling defendants.

5. On March 9, 1989 in reliance on Mr. Devaney's agreement, Xerox negotiated a global settlement agreement with Comdisco in which Xerox agreed to pay $1,875,000 to Comdisco on certain terms and Comdisco agreed to dismiss with prejudice its lawsuit against all defendants, including Devaney.

6. On or about March 17, 1989, Xerox and Comdisco entered into the global settlement negotiated on March 9, 1989. Counsel for Xerox notified Mr. Devaney's counsel on March 17, 1989 that the proposed settlement was approved by Xerox and Comdisco.

7. On or about March 20, 1989, Devaney's counsel telephoned Xerox's counsel and stated that Devaney had withdrawn his "offer" and would not make any of the payments to Xerox that he previously agreed to make as part of the global settlement.

8. The value of the consideration to Devaney of dismissal with prejudice of Comdisco's claims against Devaney and releases in favor of Devaney by all settling parties was not less than the value of the payments Devaney agreed to make to Xerox, and the agreement between Xerox and Devaney is just and reasonable as to Devaney.

9. Xerox has performed all conditions, covenants and promises required by it to be performed in accordance with the terms and conditions of its agreement with Devaney, except execution and delivery of its release in favor of Devaney, which Xerox is excused from delivering by Devaney's anticipatory repudiation of his obligation to pay Xerox $300,000.00. Xerox stands ready, willing, and

able to perform all of its obligations to Devaney under its agreement with him.

10. Xerox has no adequate legal remedy for Devaney's breach, because monetary damages, if awarded, would be inadequate compensation for Devaney's refusal to make the promised payments to Xerox and to execute and deliver appropriate general releases to Xerox and all other settling defendants as agreed.

WHEREFORE, Xerox prays for judgment as follows:

1. That Devaney be ordered to pay Xerox $300,000 and to execute and deliver a general release in favor of Xerox and Reginald St. Claire or, in the alternative, to pay to Xerox $100,000 on or before April 17, 1989 and to execute and deliver on or before April 17, 1989 (A) a promissory note in form and substance reasonably satisfactory to Xerox in the amount of $200,000 payable to the order of Xerox Corporation at 12% per annum over three years, (B) a deed of trust on Devaney's personal residence in form and substance reasonably satisfactory to Xerox in order to secure performance of his obligations under such promissory note, and (C) a general release in form and substance reasonably satisfactory to Xerox in favor of Xerox and Reginald St. Claire;

2. For interest thereon from the date of breach at the highest rate permitted by law;

3. For Xerox's costs of suit and its attorneys' fees incurred herein; and

4. For such other and further relief as the court may deed proper.

DATED: March 22, 1989

LATHAM & WATKINS
ALAN N. HALKETT
PAUL M. VAN ARSDELL, JR.
MICHAEL K. GRACE

By MICHAEL K. GRACE
Michael K. Grace
Attorneys for Cross-Claimant
Xerox Corporation

APPENDIX C

No. CV 86-7757-WDK

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Date 4/28/89

COMDISCO, INC. v. THOMAS W. DEVANEY, et al.

PRESENT: HON. WILLIAM D. KELLER, JUDGE; SARA WONG, DEPUTY CLERK.

ATTORNEYS PRESENT FOR PLAINTIFFS: NONE PRESENT; ATTORNEYS PRESENT FOR DEFENDANTS: NONE PRESENT.

PROCEEDINGS: This matter is before the Court on cross-claimant Xerox Corporation's motion to strike cross-defendant Devaney's demand for a jury trial. Xerox Corporation's cross-claim is for specific performance of a settlement agreement.

The seventh amendment preserves the right to a jury trial as it existed at common law. U.S. Const. amend. VII. There is no right to a jury at common law in a purely equitable action. *Medtronic, Inc. v. Benda*, 689 F.2d 645, 660 (7th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983). An action for specific performance without damages, such as the cross-claim asserted here, is purely equitable. *Owens-Illinois, Inc. v. Lake Shore Land Co., Inc.*, 610 F.2d 1185, 1189 (3d Cir. 1979). As a result, cross-defendant Devaney has no right to a jury trial in the cross-action. The Court hereby STRIKES cross-defendant Devaney's demand for a jury trial in the cross-claim for specific performance of the settlement agreement.

After examining the transcript of the March 21, 1989 hearing, the Court concludes that cross-defendant had a

good faith belief that the Court ordered a jury pursuant to Fed. R. Civ. P. 39(b). Although no such order was made by the Court, there was sufficient ambiguity in the Court's statements to warrant such a belief. For the foregoing reasons, cross-claimant Xerox Corporation's request for sanctions is hereby DENIED.

cc: counsel of record